

1
2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6 SUSAN BAKER, et al.,

Case No. 3:20-cv-00518-MMD-CLB

7 v.

Plaintiffs,

ORDER

8 DEAN MEILING, et al.,

9 Defendants.

10
11 **I. SUMMARY**

12 Plaintiffs, a putative class of elderly investors in a company formerly known as
13 Metalast, sued Defendants, the people and entities that either bought that company out of
14 receivership, or played a role in the receivership proceedings, in California state court, for
15 a purported fraudulent scheme and conspiracy to take Metalast through receivership so
16 some Defendants could buy it at a discounted price, causing Plaintiffs to lose all the money
17 they invested in Metalast. (ECF No. 1-3.) Certain Defendants removed this case to the
18 Central District of California (ECF No. 1), and then moved to transfer it to this Court (ECF
19 No. 13). Judge Josephine L. Staton of the Central District of California granted Defendants'
20 motion to transfer, and transferred the case to this Court. (ECF No. 52.) Before the Court
21 is Plaintiffs' motion to remand this case back to California state court (ECF No. 62
22 ("Remand Motion")),¹ and Plaintiffs' corresponding motion requesting the Court address

23
24
25
26
27
28 ¹Defendants Chemeon Surface Technology LLC, DSM P GP LLC, DSM Partners,
LP, Dean Meiling, Madylon Meiling, Meiling Family Partners, Ltd., Suite B LLC
(collectively, the "Chemeon Defendants") filed a response. (ECF No. 76.) So did
Defendants Armstrong Teasdale LLP, Janet Chubb, and Tiffany Schwartz (collectively,
the "Attorney Defendants"). (ECF No. 84.) Plaintiffs filed replies. (ECF Nos. 95, 96.)

1 the Remand Motion before it addresses other pending motions² (ECF No. 72).³ As further
 2 explained below, the Court will deny the Remand Motion because minimal diversity exists,
 3 and Defendants have met their preponderance burden to show there are more than 100
 4 potential members of the proposed class.

5 **II. BACKGROUND**

6 As mentioned, Plaintiffs' core allegation in this case is that Defendants engaged in
 7 a "fraudulent scheme" to take Metalast through receivership and buy it at a discount,
 8 depriving Plaintiffs of their investments in Metalast in the process. (ECF No. 1-3.) This is
 9 the third such case before this Court; Plaintiffs' counsel is involved in all three. By filing
 10 date, the oldest case is *Alexander v. Meiling*, Case No. 3:16-cv-00572-MMD-CLB (D. Nev.
 11 Filed Oct. 3, 2016). More recent is *Harris v Meiling*, 3:19-cv-00339-MMD-CLB (D. Nev.
 12 Filed Jun. 19, 2019). The Court dismissed *Alexander* in its entirety based on the litigation
 13 privilege. See 2020 WL 4193998 (D. Nev. July 21, 2020). Plaintiffs appealed that decision;
 14 the appeal is currently pending. See *Alexander*, Case No. 3:16-cv-00572-MMD-CLB, ECF
 15 No. 193. Like this case, Plaintiffs' counsel originally filed *Harris* in California state court,
 16 but Defendants removed it to the Central District of California, and it was subsequently
 17 transferred here by Judge Staton. See *Harris*, 3:19-cv-00339-MMD-CLB, ECF Nos. 1, 33.
 18 The Court dismissed *Harris* in its entirety on statute of limitations grounds. See 2019 WL
 19 5684175 (D. Nev. Oct. 31, 2019). Plaintiffs did not appeal that dismissal.

20 As pertinent to the Remand Motion, the named Plaintiffs in the Complaint are
 21 residents of California and Nevada. (ECF No. 1-3 at 5-6.) The Complaint does not specify
 22

23 ²The Court will address the other currently pending motions in this case in a
 24 subsequent order. (ECF Nos. 61, 65, 67.)

25 ³The Court denies this motion as moot because the Court is addressing the
 26 Remand Motion before the other pending motions. However, the Court notes that Plaintiffs'
 27 motion violates several local rules. See LR 7-2(a); LR IA 7-2; LR 78-1. The Court is already
 28 considering sanctioning Plaintiffs' counsel, in part for his noncompliance with the local
 rules (ECF No. 105.) Thus, the Court admonishes Plaintiffs' counsel and local counsel to
 review both the local rules and this Court's standing order, and comply with them going
 forward. If Plaintiffs' counsel and local counsel continue to violate the Court's local rules,
 the Court will consider additional and escalating sanctions.

1 the citizenship of Defendants Dean and Madelyn Meiling. (*Id.* at 6.) Plaintiffs further allege
 2 that Defendant Meiling Family 26 Partners, Ltd. is a Colorado limited partnership. (*Id.*) The
 3 Complaint does not specify the citizenship of Defendants James Proctor, Janet Chubb,
 4 and Tiffany Schwartz. (*Id.* at 7.) Plaintiffs further allege “Defendant Armstrong Teasdale,
 5 LLP is a duly formed Missouri limited liability partnership and law firm.” (*Id.*) The remaining
 6 Defendants are Nevada business entities of various types. (*Id.*)

7 Plaintiffs allege that over 900 people invested in Metalast. (*Id.* at 13.) The Complaint
 8 defines the proposed class as follows:

9 All members, investors, and their successors, in Metalast International, LLC
 10 subsequently named MI94, LLC, (“Investment LLC”), the largest proportion
 11 of whom are residents of California, together with the elderly Class members
 12 who are residents off [sic] Nevada, who owned membership interests and
 were at least 65 years old at the time of the conduct alleged herein, which
 has continued to date. Plaintiffs are informed and believe that said Class
 comprises less than 100 members.

13 Excluded from the Class are all Metalast members and investors, and their
 14 successors, who are residents of states other than California and Nevada,
 15 as well as Defendants, Defendants' officers, members, owners, directors,
 16 affiliates, legal representatives, employees, co-conspirators, successors,
 17 subsidiaries, and assigns, and any entity in which any Defendant has a
 18 controlling interest, as well as all judicial officers and staff presiding over this
 19 matter and counsel of record. Also specifically excluded from the Class is
 20 Marc Harris, an individual who resides in Orange County, California, and
 21 was representative plaintiff of the class in the action styled *Marc Harris, et al. v. Dean Meiling, et al.*, Case No.: 8:19-cv-00595-JLS-SEM, originally filed
 22 in the United States District Court - Central District of California, Southern
 23 Division. Also specifically excepted from the Class are any named Plaintiffs
 24 in the action styled *Jerry Alexander, et al. v. Dean Meiling, et al.*, Case No.:
 25 3:16-cv-00572-MMD-CBC, filed in the United States District Court – District
 26 of Nevada. Plaintiffs reserve the right to revise the Class Definition as a
 27 result of discovery proceedings and further investigation

28 (ECF No. 1-3 at 9-10.)

29 Defendants' notice of removal added information about the parties' citizenship and
 30 the number of putative class members. (ECF No. 1.) Specifically, as to citizenship,
 31 Defendants added that “Janet Chubb is a resident of Nevada and defendant Tiffany
 32 Schwartz is a resident of Missouri.” (*Id.* at 5.) As to the number of putative class members,
 33 Defendants pointed to representations Plaintiffs' counsel made, and evidence he
 34 submitted, in *Alexander* and *Harris* to support Defendants' allegation that, despite

1 Plaintiffs' claim in this case that the class "comprises less than 100 members" (ECF No.
2 1-3 at 10), there are well over 100 members in Plaintiffs' putative class. (ECF No. 1 at 5-
3 7.) Basically, Defendants state in their notice of removal that, in *Alexander* and *Harris*,
4 Plaintiff's counsel and Marc Harris (the lead named Plaintiff in *Harris*, and a class
5 representative in *Alexander*) submitted sworn declarations estimating the number of class
6 members as between 143 and over 500. (See *id.*)

7 Plaintiffs then filed two declarations in support of their Remand Motion, one from
8 Plaintiffs' counsel, and the other from Mr. Harris, where they swear under penalty of
9 perjury that the proposed class consists of up to 98 plaintiffs. (ECF Nos. 62-1, 62-1.) Mr.
10 Harris states that he maintains and updates "the 'Investment LLC' Member database of
11 over 900 Member interests representing over 1,200 individuals (including spouses, heirs,
12 beneficiaries, and even deceased members) residing in approximately forty-five (45) U.S.
13 states." (ECF No. 62-1 at 2.) He also states he maintains and updates a related Microsoft
14 Excel spreadsheet. (*Id.*) Mr. Harris goes on to explain that he now believes up to 98 is the
15 best number of potential plaintiffs, and reconciles his current belief with his previous sworn
16 estimate of 143, and another sworn estimate of 232 Plaintiffs' counsel made based on
17 information provided by Harris. (*Id.* at 2-4.) The big difference is that, on Plaintiffs'
18 counsel's advice, Mr. Harris has now decided to exclude from the potential class: (1) non-
19 member spouses of members; (2) deceased individuals; (3) people who were not age 65
20 before December 1, 2013; and (4) "beneficiaries of Membership interests that were held
21 in assert [sic] protection vehicles." (*Id.* at 2-4.) He also says he gave Plaintiffs' counsel a
22 copy of the Microsoft Excel document he has been maintaining. (*Id.* at 3-4.)

23 Plaintiffs' counsel's declaration is largely complementary to Mr. Harris' declaration,
24 essentially proffering the same facts and rationale from Plaintiffs' counsel's perspective.
25 (ECF No. 61-2.) Plaintiffs' counsel explains that the main difference between the up to 98
26 number he and Mr. Harris now proffer and the number of potential plaintiffs they previously
27 offered in *Harris* is that he decided not to include the four categories of potential plaintiffs
28 referenced above. (*Id.* at 3; see also *id.* at 3-5.) Plaintiffs' counsel goes on to state that Mr.

1 Harris gave him a copy of the Excel spreadsheet, “which I have since closely scrutinized,
 2 examined and scoured in connection with my determination of the numerosity element in
 3 this action[.]” (*Id.* at 3.)

4 Then, in opposing the Remand Motion, Chemeon Defendants proffered additional
 5 evidence of their own. First, the Chemeon Defendants remind the Court Plaintiffs’ counsel
 6 either serves as counsel or filed two other cases⁴ against people and entities involved in
 7 Metalast, and that both of these cases included Mr. Harris as a class representative. (ECF
 8 No. 76 at 7.) In one of those cases, Mr. Harris stated in discovery responses that he had
 9 destroyed any and all information he ever had about Metalast. (*Id.* at 7-9 (citing ECF Nos.
 10 76-2, 76-3).) Further, in his deposition taken in 2016, Mr. Harris testified he had destroyed
 11 his Metalast records. (ECF No. 76 at 9 (citing ECF No. 76-4).) Mr. Harris also testified at
 12 his deposition that there was a company database listing all of Metalast’s investors, but
 13 he never had access to it, and he nonetheless estimated that over 900 people had
 14 invested in Metalast, about half of them retirees. (*Id.*) Second, the Chemeon Defendants
 15 point out that in *Harris*, Plaintiffs’ counsel changed his guess as to the number of potential
 16 class members (of a class defined in a nearly identical way to the class in this case) from
 17 over 500 to under 100, to 143, to 195, apparently as it suited him. (*Id.* at 10-11.) Third, as
 18 to minimal diversity, the Chemeon Defendants proffer declarations from Ms. Chubb and
 19 Ms. Schwartz stating they are citizens of Nevada, and Missouri, respectively. (*Id.* at 13
 20 (citing ECF Nos. 36-2, 36-3).) Fourth, again as to numerosity, the Chemeon Defendants
 21 point out “that the receiver, James Proctor, used [a master service list] for service
 22 purposes in connection with the 2013 MILLC receivership proceeding, which master list
 23 contained a total of at least 990 MILLC members.” (*Id.* at 17 (citing ECF No. 77-2 at 18-
 24 45).)

25 In sum, the parties have presented conflicting evidence as to whether the minimal
 26 diversity and numerosity requirements for the Court to exercise CAFA jurisdiction are
 27

28 ⁴There are actually even more cases than that. See, e.g., *Harris*, 2019 WL
 5684175, at *1.

1 satisfied here. Further, all parties view this case as part of a sequence of similar cases (as
 2 does the Court). Finally, the Court notes that Judge Staton transferred this case to this
 3 Court in part because she determined Plaintiffs' counsel was engaged in "blatant forum
 4 shopping," and was seeking to avoid the Court's unfavorable rulings in *Alexander* and
 5 *Harris* in filing yet another similar class action in California state court, opposing transfer
 6 to this Court, and seeking to have this case remanded back to state court. (ECF No. 52 at
 7 8.)

8 **III. LEGAL STANDARD**

9 Federal courts are courts of limited jurisdiction, having subject matter jurisdiction
 10 only over matters authorized by the Constitution and Congress. See U.S. Const. art. III, §
 11 2, cl. 1; see also, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
 12 (1994). A suit filed in state court may be removed to federal court if the federal court would
 13 have had original jurisdiction over the suit. See 28 U.S.C. § 1441(a). Here, Defendants
 14 removed under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), which, in
 15 pertinent part, vests federal district courts with "original jurisdiction to hear a class action
 16 if the class has more than 100 members, the parties are minimally diverse, and the matter
 17 in controversy exceeds the sum or value of \$5,000,000." *Standard Fire Ins. Co. v.*
 18 *Knowles*, 568 U.S. 588, 592 (2013) (citing 28 U.S.C. § 1332(d)(2), (d)(5)(B)) (internal
 19 quotation marks omitted).

20 "[N]o antiremoval presumption attends cases invoking CAFA, which Congress
 21 enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee*
22 Basin Operating Co., LLC v. Owens, 574 U.S. 81, 89 (2014) (citing *Standard Fire*, 568
 23 U.S. at 595). "CAFA's provisions should be read broadly, with a strong preference that
 24 interstate class actions should be heard in a federal court if properly removed by any
 25 defendant." *Id.* (citations and internal quotation marks omitted).

26 "[A] defendant seeking to remove a case to a federal court must file in the federal
 27 forum a notice of removal containing a short and plain statement of the grounds for
 28 removal." *Id.* at 87. (internal quotation marks and citations omitted). Where, as here (ECF

1 No. 62), a plaintiff factually challenges the defendants' statements in their notice of
2 removal, "both sides submit proof and the court decides, by a preponderance of the
3 evidence" whether CAFA's jurisdictional requirements are satisfied. *Id.* at 88. Generally
4 speaking, the party opposing the factual attack—here, Defendants—must support their
5 "jurisdictional allegations with competent proof, under the same evidentiary standard that
6 governs in the summary judgment context." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th
7 Cir. 2014) (internal quotation marks and citations omitted); see also *id.* at 1122.

8 **IV. DISCUSSION**

9 Plaintiffs make two main arguments in their Remand Motion. Neither is persuasive.
10 The Court will first briefly address Plaintiffs' argument that Defendants insufficiently
11 alleged minimal diversity when they removed this case, and then address Plaintiffs'
12 attempt to cap the number of members of the proposed class at 98, to which the parties'
13 devote much of their argument.

14 **A. Minimal Diversity**

15 Plaintiffs argue the Court should remand this case for lack of minimal diversity
16 because Defendants did not specify the citizenships of all Defendants in their notice of
17 removal, and while Defendants did state that Defendants Chubb and Schwartz are
18 residents of Nevada and Missouri, respectively, Defendants' notice of removal is
19 nonetheless fatally defective because it did not specify Chubb and Schwartz are citizens
20 of those states. (ECF No. 62 at 20-22.) The Chemeon Defendants respond that the
21 citizenships of all parties to this case are immaterial because Plaintiffs themselves
22 establish minimal diversity by alleging they are residents of California and Nevada
23 (depending on the person), Chubb and Schwartz are both residents and citizens of
24 Nevada and Missouri, and Defendants' notice of removal is either not fatally defective
25 because it used 'resident' instead of 'citizen,' or the Court could grant them leave to amend
26 their notice to clarify Chubb and Schwartz are citizens of those states. (ECF No. 76 at 23-
27 25.) Attorney Defendants make a similar argument. (ECF No. 84 at 12-14.) The Court
28 agrees with Defendants.

1 Minimal diversity is present here. Plaintiffs allege they are residents of California
2 and Nevada, and have not subsequently offered any contradictory argument or evidence.
3 (ECF No. 1-3 at 5-6.) Defendants proffered declarations from Chubb and Schwartz stating
4 they are citizens of Nevada and Missouri (ECF Nos. 36-2, 36-3), which aligns with, and
5 builds upon, the statements in the notice of removal that they are residents of those states
6 (ECF No. 1 at 5). This is enough information for the Court to conclude CAFA's minimal
7 diversity requirement is satisfied. See 28 U.S.C § 1332(d)(2)(A) (defining minimal diversity
8 as where "any member of a class of plaintiffs is a citizen of a State different from any
9 defendant"). Relatedly, Plaintiffs' argument that the parties have not provided full
10 citizenship information for each and every Plaintiff and Defendant is beside the point. (ECF
11 No. 62 at 21-22.) See also *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 882 (9th
12 Cir. 2013) ("Through CAFA, Congress broadened federal diversity jurisdiction over class
13 actions by, among other things, replacing the typical requirement of complete diversity
14 with one of only minimal diversity[.]"). In sum, the Court rejects Plaintiffs' arguments as to
15 minimal diversity.

16 **B. Numerosity**

17 Plaintiffs primarily argue removal was improper because they allege in their
18 Complaint that they "are informed and believe that said Class comprises less than 100
19 members." (ECF No. 62 at 15-16 (citing in pertinent part ECF No. 1-3 at 10).) Because
20 CAFA jurisdiction requires more than 100 putative class members, and Plaintiffs are the
21 'masters of their Complaint,' Plaintiffs argue the Court must remand this case. (ECF No.
22 62 at 14-16.) Plaintiffs then offer an explanation supported by declarations as to why
23 Plaintiffs' counsel and Mr. Harris' prior estimates putting the basically identical classes at
24 issue in *Alexander* and *Harris* well over 100 were inaccurate, and why their current
25 estimate of up to 98 members is. (*Id.* at 16-18.) Defendants generally counter that: (1) the
26 Court should err in favor of exercising jurisdiction here, especially because Plaintiffs are
27 blatantly forum shopping; (2) the preponderance of the evidence shows that the putative
28 class size is more than 100; (3) the declarations submitted by Plaintiffs' counsel and Harris

1 violate the best evidence rule, consist primarily of inadmissible hearsay, and are otherwise
2 unreliable; and (4) even as defined by Plaintiffs, the putative class numbers more than
3 100. (ECF No. 76 at 15-23, 84 at 7-12.) The Court fully agrees with Defendants.

4 To start, Plaintiffs' numerosity argument rests on several incorrect legal premises.
5 Specifically, Plaintiffs urge the Court to apply a presumption against removal here. (ECF
6 No. 62 at 12-13.) However, no such presumption applies. See *Dart Cherokee*, 574 U.S. at
7 89 ("no antiremoval presumption attends cases invoking CAFA, which Congress enacted
8 to facilitate adjudication of certain class actions in federal court."). Plaintiffs also argue
9 they are the masters of their Complaint, but that principle is subject to a few important
10 limitations Plaintiffs neglect to mention. In pertinent part, Plaintiffs rely on several CAFA
11 mass action cases to support that proposition, which the Ninth Circuit has instructed must
12 be treated differently than this CAFA class action. (ECF Nos. 1-3 (making class action
13 allegations), 62 at 15 (making the argument, primarily relying on *Corber v. Xanodyne*
14 *Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc) and *Dunson v. Cordis Corp.*, 854
15 F.3d 551 (9th Cir. 2017)).) *But see Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953-56 (9th
16 Cir. 2009) (finding that the plaintiffs' counsel could structure proposed mass actions to
17 avoid federal jurisdiction, but drawing a contrast between mass actions and class actions,
18 indicating that mass action precedents do not govern class actions brought under CAFA,
19 and that class actions cannot necessarily be arbitrarily structured to avoid federal court
20 jurisdiction). Thus, *Corber* and *Dunson* do not apply here. See *id.*

21 Moreover, and as the Attorney Defendants argue (ECF No. 82 at 12 n.6), *Corber*
22 does not support the broad reading Plaintiffs advance here even if it did apply because
23 there the Ninth Circuit said it would "hold plaintiffs responsible for what they have said and
24 done[,]" and nonetheless concluded that case should not have been remanded. *Corber*,
25 771 F.3d at 1223. Here, Attorney Defendants reasonably argue that means the Court
26 should hold Plaintiffs' counsel to the prior statements he made in *Alexander and Harris*
27 about the size of the putative class. (ECF No. 82 at 12 n.6.) Finally, while Plaintiffs
28 generally claim they can arbitrarily cap the size of their punitive class (ECF No. 62 at 14-

1 15), their attempt to do so here conflicts—at least analogously—with the Supreme Court’s
2 clear direction that plaintiffs cannot arbitrarily cap the amount of damages they seek to
3 prevent a federal court from exercising CAFA jurisdiction in a class action. See *Standard*
4 *Fire*, 568 U.S. 588 (holding that plaintiffs’ counsel cannot stipulate to a damages amount
5 less than \$5 million to avoid CAFA jurisdiction). Thus, Plaintiffs’ numerosity arguments
6 rest on shaky legal foundations.

7 Indeed, instead of simply accepting Plaintiffs’ arbitrary cap of 98 class members,
8 the Court’s task here is to evaluate the evidence proffered by both parties and determine
9 whether the preponderance of the evidence shows the putative class likely includes more
10 than 100 members. See *Dart Cherokee*, 574 U.S. at 87-89; *Leite*, 749 F.3d at 1121-23.
11 Having considered the evidence proffered by the parties, it is more likely than not the
12 putative class exceeds 100 members.

13 On the one hand, the Court finds the evidence submitted or referred to by
14 Defendants meets their preponderance burden to show the putative class exceeds 100
15 members. Plaintiffs allege that over 900 people invested in Metalast. (ECF No. 1-3 at 13.)
16 Mr. Harris states as much in his declaration filed with the Remand Motion, where he claims
17 he maintains a database of “900 Member interests representing over 1,200 individuals.”
18 (ECF No. 62-1 at 2.) This also roughly aligns with the Chemeon Defendants’ proffered
19 service list from the 2013 MILLC receivership proceeding, reflecting that the receiver, Mr.
20 Proctor, mailed out notice of the receivership proceeding to 990 MILLC members. (ECF
21 No. 76 at 17 (citing ECF No. 77-2 at 18-45).) Taken together, this evidence shows the
22 potential putative class here would be drawn from a larger group of over 900.

23 Of course, the proposed putative class only reflects investors from California or
24 Nevada who were over 65 at the pertinent time, so the number of class members is
25 logically fewer than 900. (ECF No. 1-3 at 9-10.) But statements by Plaintiffs’ counsel and
26 Mr. Harris in prior, related litigation suggest the number of class members is well over 100.
27 In a prior deposition, Mr. Harris testified that probably about half of all people who invested
28 in Metalast were retired. (ECF No. 76-4.) More tellingly, both Plaintiffs’ counsel and Mr.

1 Harris submitted sworn declarations in prior, related litigation that the number of potential
2 class members (of a class defined in a nearly identical way to the class in this case) was
3 much higher than they now assert—from over 500, to under 100 (to support a motion to
4 remand later abandoned), to 143, to 195. (ECF No. 76 at 10-11.) All of this leads the Court
5 to find it is more likely than not the putative class exceeds 100 members.

6 On the other hand, Plaintiffs' declarations proffered with their Remand Motion offer
7 inadmissible evidence and are otherwise unpersuasive. Both Plaintiffs' counsel and Mr.
8 Harris are testifying to the content of an Excel spreadsheet, but do not proffer the Excel
9 spreadsheet itself. (ECF Nos. 62-1, 62-2.) Neither declaration explains why they do not
10 proffer the Excel spreadsheet itself, though both declarations allude to attorney-client
11 privilege. (ECF Nos. 62-1 at 4, 62-2 at 5.) These declarations thus violate the best
12 evidence rule. See *United States v. Bennett*, 363 F.3d 947, 952-54 (9th Cir. 2004) (finding
13 that a proponent's testimony about a GPS system's data violated the best evidence rule
14 and explaining that the best evidence rule requires a proponent to either produce the
15 original or explain its absence if the proponent is testifying to the content of an electronic
16 document but not providing either the original or a copy). Moreover, both declarations are
17 largely hearsay, because they primarily offer the purported contents of the Excel
18 spreadsheet for the truth of the matter asserted—that the putative class could not exceed
19 98 people. (ECF Nos. 62-1, 62-2.) See also Fed. R. Evid. 801(c) (defining hearsay in
20 pertinent part as an out-of-court statement offered for the truth of the matter asserted);
21 Fed. R. Evid. 802 (providing that hearsay is inadmissible).

22 And beyond those two issues, neither declaration is particularly reliable because
23 they both contradict declarations offered on the same issue, by the same people, in very
24 similar cases. (ECF No. 76 at 18-20.) In particular, Mr. Harris' declaration is hard to
25 reconcile with his statements in discovery responses and depositions in other related
26 cases—proffered by Defendants here (*id.* at 20)—that he had destroyed all records he
27 had about Metalast, which would seem to include the very Excel spreadsheet he and
28 Plaintiffs' counsel attempt to rely on through their declarations supporting the Remand

1 Motion. (ECF Nos. 76-2, 76-3, 76-4.) Moreover, Plaintiffs' counsel has a clear incentive to
2 keep putative class membership below 100 to avoid this Court, casting doubt on the
3 credibility of his declaration. This incentive is evidenced both by his attempt to impose an
4 arbitrary cap in the Complaint and this very Remand Motion—not to mention Judge
5 Staton's reasonable observation that Plaintiffs' counsel appears to be engaged in forum
6 shopping to avoid the Court's unfavorable rulings in *Alexander* and *Harris*. (ECF No. 52 at
7 8.) Thus, the Court assigns little weight to Plaintiffs' proffered declarations.

8 Even if the Court were to assign some weight to Plaintiffs' proffered declarations,
9 they are unpersuasive on their own terms. For example, Plaintiffs' counsel and Mr. Harris
10 attribute part of the reduction getting them down to 'up to 98' plaintiffs from their prior
11 declarations in related cases to excluding non-member spouses and deceased persons.
12 (ECF Nos. 62-1 at 2, 62-2 at 4.) But Plaintiffs also try to define their proposed class as
13 including "[a]ll members, investors, and their successors, in Metalast[,]'" which could
14 logically include both spouses and the successors of deceased people. (ECF No. 1-3 at
15 9.) And it certainly includes 'investors,' which sweeps more broadly than Mr. Harris and
16 Plaintiffs' counsel's approach in their declarations of limiting the putative class to exclude
17 "non-member spouses of members who did not hold legal title to any membership
18 interests[.]" (Compare ECF No. 1-3 at 9-10 with ECF Nos. 62-1 at 2, 62-2 at 2.) Under
19 CAFA, "the term 'class members' means the persons (named or unnamed) who fall within
20 the definition of the proposed or certified class in a class action." 28 U.S.C. §
21 1332(d)(1)(D). Thus, the rationale for excluding certain potential plaintiffs offered in
22 Plaintiffs' declarations offered does not follow, and indeed conflicts with how potential
23 plaintiffs must be counted under CAFA.

24 In sum, Plaintiffs' proffered evidence is easily outweighed by Defendants', which
25 establishes by a preponderance of the evidence that the putative class exceeds 100
26 members. The Court therefore finds that, contrary to Plaintiffs' arguments, both the
27 minimal diversity and numerosity requirements for the Court to exercise CAFA jurisdiction
28 are satisfied here. The Remand Motion is denied.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Remand Motion.

It is therefore ordered that Plaintiffs' motion to remand (ECF No. 62) is denied.

It is further ordered that Plaintiffs' *ex parte* motion regarding the motion to remand (ECF No. 72) is denied as moot.

DATED THIS 29th Day of October 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE